

The opinion in support of the decision being entered today was not written  
for publication and is not binding precedent of the Board.

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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Ex parte LAURENCE H. LANGHOLZ and ROBERT C. BROTHERS

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Appeal No. 2006-0582  
Application No. 09/328,120

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ON BRIEF

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Before CRAWFORD, NAPPI, and FETTING, Administrative Patent Judges.  
CRAWFORD, Administrative Patent Judge.

**DECISION ON APPEAL**

This is a decision on appeal from the examiner's final rejection of claims 19 to 29, which are all of the claims pending in this application. Claims 1 to 18 have been cancelled.

The appellants' invention relates to a seal for a nasal mask for providing pressurized air or therapeutic gas to a patient suffering from an airflow limitation or other respiratory ailment (specification, pages 1 and 4). A copy of the claims under appeal is set forth in the appendix to the appellants' brief.

#### THE PRIOR ART

The prior art reference of record relied upon by the examiner in rejecting the appealed claims is:

Johnson et al. (Johnson)	3,725,953	Apr. 10, 1973
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#### THE REJECTION

Claims 19 to 29 stand rejected under 35 U.S.C. § 103 as being unpatentable over Johnson.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellants regarding the above-noted rejection, we make reference to the answer (mailed March 24, 2004) for the examiner's complete reasoning in support of the rejection, and to the brief (filed November 24, 2003) and reply brief (filed May 26, 2004) for the appellants' arguments thereagainst.

### OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellants' specification and claims, to the applied prior art reference, and to the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations which follow.

The examiner has rejected the claims under 35 U.S.C. § 103. We note that “a claim” the test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981).

In support of this rejection, the examiner states:

Johnson discloses a seal having a bladder 21 filled with a resilient rubber tubing material 22. However, the softness of the material, and the shape and thickness of the seal is not disclosed. Applicant has failed to provide any disclosure as to the criticality of any of these attributes or characteristics. Lacking any criticality, the examiner considers all of these features to be obvious design choices, noting that it would appear as though the prior art seal would perform equally as well as the applicant's [sic] seal as the prior art seal is disclosed as being useful to seal against faces having differing contours. No advantage, particular purpose or solution to a problem was disclosed by the applicant. Therefore, it would have been an obvious matter of design choice to modify Johnson to obtain the invention as specified in claims [final rejection page 3].

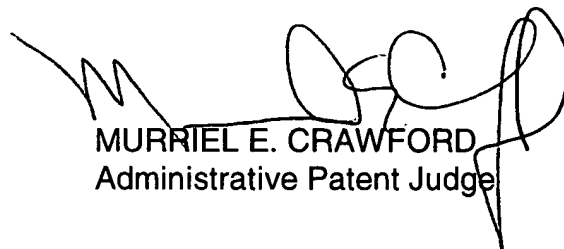
Appellants' specification explains that when a nasal mask is not comfortable, the patient will either not wear the mask or wear the mask improperly (specification at page 2). The softness of the seal of and design of the nasal mask of appellants' invention invites minimal contact between the user's epidermal areas and the device and thus creates a comfortable and reliable seal about the user's nares (specification at page 4). The softness of the seal is described as being "particularly soft" and being comprised of a bladder filled with soft material having durometer value of less than about ten on the Shore scale (specification at page 14). The specification more specifically discloses that the Shore reading of the soft material is too soft for measurement by ASTM approved durometer test methods but is appellants' preferred method for characterizing the seal softness (specification at page 15).

As such, the appellants' specification describes the softness of the seal and the advantage accrued from the softness, i.e. improvement in comfort for the person wearing the nasal mask and therefore the tendency of the patient tends to wear the mask properly more consistently. Therefore, we do not agree with the examiner that the appellants' specification does not disclose that the softness of the mask solves a stated problem. The solution of the problem of non consistent wear of the nasal mask due to the lack of comfort in wearing the mask is plainly described in the specification. Therefore, we are not of the opinion that it would have been a matter of design choice

to modify Johnson to obtain a seal having a bladder filled with a material with durometer value less than about ten on a Shore 000 scale.

In view of the foregoing, we will not sustain this rejection. The decision of the examiner is reversed.

REVERSED



MURRIEL E. CRAWFORD  
Administrative Patent Judge



ROBERT E. NAPPI  
Administrative Patent Judge



ANTON W. FETTING  
Administrative Patent Judge

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